Health Resources of Lakeview, Inc. *and* Local 1115-New Jersey South SEIU, AFL–CIO, CLC. Case 4-RC–19816

October 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held November 18, 1999,[1] and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement.[2] The tally of ballots shows eight ballots cast for and seven against the Petitioner, with two challenged ballots.

The Board has reviewed the record in light of the exceptions, and adopts the hearing officer's findings[3] and recommendations, only to the extent consistent with this decision.[4]

The Employer has excepted to the hearing officer's finding that part-time housekeeper Dorothy Chulsky is a statutory supervisor. We find merit to the exception for the following reasons.

Chulsky worked in the housekeeping department and spent most of her time doing vacuuming and laundry. The record establishes that John Brzyski was the housekeeping supervisor until he left the facility in April. From April through late August, there was turnover in the supervisor position. According to part-time housekeeper Shannon Hall,[5] Chulsky served as acting supervisor until the end of September when Chris Sodano was hired as the supervisor. Sodano regularly worked weekdays. The Petitioner maintains that Chulsky is a supervisor, at least on weekends.

Section 2(11) of the Act defines a statutory supervisor as "[a]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Supervisory authority "must be exercised with independent judgment on behalf of management and not in a routine manner. Thus, the exercise of some 'supervisory authority' in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status." *Masterform Tool Co.,* 327 NLRB 1071 (1999), and cases cited therein. Further, an employee's temporary assumption of supervisory duties is not sufficient to establish statutory supervisory status. *St. Francis Medical Center-West,* 323 NLRB 1046 (1997), and cases cited therein. Finally, the burden of proving that an individual is a supervisor is placed on the party alleging that supervisory status exists. Id.

In finding that Chulsky was a supervisor, the hearing officer relied on Hall's testimony that Chulsky: (1) changed employees' schedules and permitted employees to come in late or leave early; (2) hired an employee; and (3) disciplined Hall. Additionally, the hearing officer relied on Hall's testimony that Chulsky wore a nametag with the designation "Lead Supervisor" until a week before the election.

Contrary to the hearing officer, we find on this record that the Petitioner has failed to sustain its burden to establish 2(11) status. To begin with, although Chulsky, when she was the acting supervisor in the housekeeping department from April through August, may have temporarily possessed statutory supervisory authority, the record does not establish that she possessed this authority after Sodano was hired as the supervisor in the housekeeping department in late September. Nor is there any evidence that Chulsky's assumption of this supervisory position is likely to reoccur. In this regard, although Hall testified that Chulsky made up the work schedule for housekeeping employees, Hall's testimony also indicates that Sodano assumed that duty when he came on board. Thus, even assuming that this assignment of work is indicative of supervisory status, there is no showing that Chulsky possessed the authority to make schedules during the critical period[6] or at the time of the election.

With respect to schedule changes on weekends, Hall testified that if she needed to change her breaktime or lunchtime, she would talk to Chulsky.[7] Further, Hall and facility Administrator James Nosuchinsky testified that Chulsky could telephone off-duty employees to request that they come in to work for absent employees. Hall

[1] All dates are in 1999.

[2] The stipulated unit is all full-time and regular part-time housekeeping employees, laundry employees, and activity aides employed by the Employer at its 963 Ocean Avenue, Lakewood, New Jersey facility, excluding all other employees, including professional employees, guards, and supervisors as defined in the Act.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[4] In the absence of exceptions, we adopt the hearing officer's recommendation to overrule the challenge to the ballot of Patricia Terry.

[5] Hall worked weekdays and every other weekend.

[6] The petition was filed on October 13.

[7] According to Hall, Chulsky has also told Hall when her break was over.

also testified that "around the 4th of July I was sick and I asked [Chulsky] can I go home and [Chulsky] sent me home" without checking with anyone. However, accommodating an employee's break needs is a common sense consideration that does not require the use of independent judgment but rather "routine work judgment." *J. C. Brock Corp.*, 314 NLRB 157, 159 (1994). The same is true of Chulsky's authority to call off-duty employees about filling in for absent employees. Moreover, Nosuchinsky's testimony that Chulsky could ask, but not compel, an employee to come to work on his day off is uncontroverted. Finally, it is well settled that sending an ill employee home is an exercise of routine discretion and not independent judgment. *Chrome Deposit Corp*., 323 NLRB 961 (1997); *J. C. Brock Corp*., supra.

In finding that Chulsky had authority to hire, the hearing officer relied on Hall's testimony that in October Chulsky complained, "I should not have hired [employee Carl Harris] back because right now he's not doing his work." In this connection, Hall testified that Harris had been out of work on disability. Nosuchinsky similarly testified that Harris "had been on disability and came back." Nosuchinksy said that the paperwork for his return was done through the Human Resources Office, and that Harris was rehired in mid-September and returned to work on September 28. Contrary to the hearing officer, we find that Hall's hearsay testimony is insufficient to establish that Chulsky is a statutory supervisor. As a general matter, an employee who is out of work "on disability" remains an employee and is not "hired" in the same sense that a new employee is hired or "rehired" in the same sense that an individual who severed his employment is rehired. *Vanalco, Inc.,* 315 NLRB 618 (1994); *Mediplex of Milford*, 319 NLRB 281, 298 (1995); *Allegany Aggregates*, 327 NLRB 658 (1999). Further, the record contains no specific evidence detailing Chulsky's role with respect to Harris' return to work. Additionally, even if the hearing officer was correct in concluding that Chulsky exercised supervisory authority in whatever role she played in Harris' return to work in September, there is no evidence, noted above, that she retained that authority after Sodano was hired as the Housekeeping supervisor in late September. See *St. Francis Medical Center-West*, supra.

Regarding Chulsky's purported authority to discipline employees, Hall testified that one time Chulsky told her that she was late for work and that she was not allowed to come in late any more. The hearing officer characterized the incident as an oral warning. Contrary to the hearing officer, however, we find that an experienced employee or leadperson's telling another employee what the work rules are or what they might get in trouble for does not make the speaker a supervisor. See *Chrome Deposit Corp.*, supra. We further note that the Petitioner failed to establish when this incident occurred, i.e., whether it occurred before or after the date Sodano was hired as the housekeeping supervisor.

Finally, we note that both Hall and Nosuchinsky testified about the change in Chulsky's nametag from "Lead Supervisor" to "Lead Housekeeper." While the timing of the change, one week before the election, may be suspicious, neither suspicion nor titles are sufficient to confer statutory supervisory status. See *Dino & Sons Realty Corp.,* 330 NLRB 680, (2000); *Victoria Partners*, 327 NLRB 54 (1998).

In view of the foregoing, we find that the Petitioner has failed to establish that Chulsky is a statutory supervisor, and we overrule the challenge to her ballot.

ORDER

The National Labor Relations Board orders that the challenges to the ballots of Patricia Terry and Dorothy Chulsky are overruled. It is further directed that the Regional Director for Region 4 shall, within 14 days from the date of this decision, open and count their ballots. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

IT IS FURTHER ORDERED that this matter is remanded to the Regional Director for Region 45 for action consistent with this Order and Direction.